

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

KEVIN KELLY,

Plaintiff,

v.

WAL-MART STORES, INC.,

Defendant.

CIVIL ACTION FILE NO:
5:12-CV-413

**PLAINTIFF'S MOTION FOR FEES AND COSTS
FOR FAILURE TO WAIVE SERVICE AND
MEMORANDUM IN SUPPORT**

Plaintiff, by and through counsel, files this motion pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure to award him attorneys' fees and costs associated with serving Defendant with the original complaint and summons in the above referenced case.

FACTUAL BACKGROUND

Plaintiff filed this complaint on October 16, 2012. At that time, Defendant was represented by attorney Will Adams of Taylor, English & Duma, LLP. On October 29, 2012, counsel for Plaintiff sent the complaint, civil cover sheet and waiver of service forms to Mr. Adams pursuant to Rule 4 of the Fed. R.Civ.P. *See* Declaration of John F. Beasley, Jr. (hereafter "Beasley Dec.") at ¶ 9, attached as

Exhibit A. After receiving the waiver forms, Mr. Adams called Plaintiff's counsel to inform him that the Defendant was not willing to waive service. *Id.* at ¶ 10. Counsel for Plaintiff reminded Mr. Adams of the costs associated with requiring personal service and he indicated that he would check with his client to confirm that it would insist on personal service. On or about November 28, 2012, Mr. Adams called to confirm that his client would not be waiving service.

Accordingly, Plaintiff's counsel arranged for and had the complaint and summons in this matter served on Defendant by service upon its registered agent, Corporation Process Company, on December 3, 2012. *See* Beasley Dec. at ¶ 10 and Affidavit of Service attached thereto. Service was perfected by a private process server, MLQ Services, at a cost of \$89.00. *See* Beasley Dec. at ¶ 10 and Invoice for Service attached thereto. Pursuant to Fed.R.Civ.P. 4, counsel for Plaintiff is moving for recovery of costs and fees. Attorney's fees associated with preparation of this motion are \$940. *See* Beasley Dec. at ¶¶ 11-12.

ARGUMENT AND CITATION OF AUTHORITY

Rule 4(d) of the Fed.R.Civ.P. provides, in part that:

An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) *has a duty to avoid unnecessary expenses of serving the summons*. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons.

Fed.R.Civ.P. 4(d)(1) (emphasis added). The whole purpose of Rule 4(d) is “to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel.” Fed. R. Civ. P. 4(d) Advisory Committee note on 1993 amendments. Rule 4 thus imposes a duty upon parties who receive notice of an action to avoid unnecessary costs of serving the summons and provides a mechanism for plaintiffs to avoid the expense of personal service.

The Rule goes on to provide that “[i]f a defendant . . . fails, without good cause, to sign and return a waiver requested by a plaintiff . . . the court *must* impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.” Fed. R. Civ. P. 4(d)(2). In this case, the Defendant had no good cause for refusing to waive service other than personal preference. As a result, Defendant is obligated to pay Plaintiff’s costs and attorney’s fees. *See Estate of Darulis v. Garate*, 401 F.3d 1060, 1064 (9th Cir. 2005)(abuse of discretion to deny costs); *Schaller v. Nat'l Alliance Ins. Co.*, 496 F. Supp. 2d 887, 889 (S.D. Ohio 2007)(awarding costs and attorneys' fees to plaintiff pursuant to Rule 4(d)(2) and (5) for defendant's failure to return waiver of service of summons).

WHEREFORE, Plaintiff requests that he be awarded \$1,029 in fees and costs associated with perfecting personal service on Defendant in this case and the motion for recovery of costs.

Respectfully submitted,

JF BEASLEY, LLC

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Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1(D), the undersigned counsel certifies that the foregoing has been prepared in Times New Roman (14 point) font, as approved by the Court in LR 5.1B.

JF BEASLEY, LLC

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Counsel for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2012, I electronically filed the foregoing **Plaintiff's Motion for Fees and Costs for Failure to Acknowledge Service and Memorandum in Support** with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to counsel of record as follows:

Will Adams
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This 28 day of December, 2012.

JF BEASLEY, LLC

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